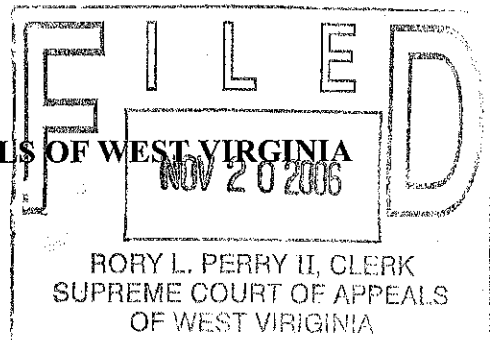


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA



STATE OF WEST VIRGINIA,

Appellee,

v.

**Supreme Court No. 33191
Circuit Court No. 04-F-3
(Kanawha)**

WADE C. DAVIS,

Appellant.

APPELLANT'S BRIEF

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PROCEEDINGS AND RULINGS BELOW

From his initial statement to police until the end of his trial for first degree murder in the Kanawha County Circuit Court, Wade Davis maintained he did not intend to kill Michael Lattea when they fought on the Go-Mart parking lot in Sissonville on the evening of March 17, 2003. However, the jury could not properly consider Wade's testimony as the trial court's instructions to the jury failed to require an intent to kill for second degree murder. (Trial Transcript, Volume (Tr. Vol.) IV 140). Consequently, the trial court's erroneous instruction resulted in the jury finding Wade guilty of second degree murder. If you follow the jury's communications to the court through to the verdict it is clear the jury believed Wade when he testified he did not intend to kill Michael Lattea.

The jury struggled with the differing degrees of murder during trial and sent notes to the court on three different occasions requesting clarification. See notes from the jury, attached in the Appendix (App.) at A1-3. It is evident from the jury's third note to the trial court that they mistakenly believed second degree murder does not require an intent to kill, due to the trial court's faulty instruction for second degree murder. The jury's third question focused upon the essence of Wade's testimony that the killing was unintentional. The jury asked, "Can you please verify the following: Is second degree with malice and unlawful without intent and voluntary manslaughter without malice and with intent in the heat of passion. Please verify the with and without intent. Thanks Hazel Mead." (Emphasis in original) (App. A-3). On December 10, 2004, only minutes after the trial court answered the jury's question by re-reading to them the faulty second degree murder instruction and the voluntary murder instruction, the jury found Wade guilty of second degree murder -- the offense they believed did not require intent to kill. Because Wade testified the killing was unintentional, the trial

court's failure to require an intent to kill for second degree murder was very prejudicial, resulting in his conviction for that offense. Had the jury been properly instructed, it appears they would have reached a verdict of guilty of involuntary manslaughter. Wade Davis was also found not guilty of the malicious wounding against Eddie Lattea by the jury.

On January 28, 2005, a hearing was held before the Honorable James C. Stucky on Wade's motion for acquittal or in the alternative a new trial. During that hearing, defense counsel argued that the second degree murder instruction given to the jury which did not require intent to kill was plain error, citing this court's decision in State v. Guthrie, 194 W.Va. 657, 461 S.E2d 163 (1995). (January 28, 2005, Hearing Transcript (1/28/05 Tr.) 4) Incredibly, first assistant prosecutor Don Morris argued that second degree murder is not an intentional crime in West Virginia. He argued that intent is what separates first degree and second degree murder. (1/28/05 Tr. 8). The trial court ruled that the jury was properly instructed and denied defense counsel's motion. (1/28/05 Tr. 13)

On March 2, 2005, Wade Davis was sentenced to a determinate term of ten (10) years in prison. On June 22, 2005, the Kanawha County Public Defender's Office was appointed to represent him on his appeal.

STATEMENT OF FACTS

The instant Wade Davis hit the pavement of the Go Mart parking lot, he was in a state of panic. As he laid face first on the pavement, he knew his life was in great danger. Wade knew he had three assailants on that lot, and he could only see one of them. Because of his training as a former police officer, he knew he had to get to his feet, and fast. Wade knew his life depended on his getting to his feet before one of the three assailants made it to him. (Trial Transcript, Volume (Tr. Vol). IV 48)

Unfortunately, he was not fast enough. Wade was only partially off the ground at the moment Michael Lattea came from behind and landed on his back. Michael Lattea immediately began to beat him repeatedly in the back of the head and upper body with a closed fist. While Wade was trying to defend against Michael's vicious attack, Wade could see Eddie Lattea, Michael's father, fast approaching to join in the beating, and he had no idea where Donald Shaffer, the biggest of all three of the assailants, was. All Wade knew was that Donald would not be far behind. (Tr. Vol. IV 50)

Sheer panic does not even begin to describe what Wade Davis was feeling. His only thought was that he needed to get back to his truck. While Michael was on his back beating him, Wade was blindly swinging his knife backwards in an attempt to get Michael Lattea to move off of him, so he could get to his feet. He was not trying to stab Michael, he was just trying to free himself from Michael before the others reached them. Wade was unsuccessful in warding off Michael's attack. Michael ceased the violent attack only when one of the other assailants, Donald Shaffer, came charging at them in the Lattea's truck. Both Wade and Michael had to jump out of the way of the truck to keep from being struck. (Tr. Vol. IV 51-53)

This type of behavior was common for the Latteas' and Donald Shaffer. As Dale Casterline testified, they were known in the community to drink and to be violent, aggressive people, who like to fight two or three against one. (Tr. Vol. III 233-34). Deputy Brian Stover testified that they were violent people and they were known to fight and cause problems. (Tr. Vol. II 228) A former high school teacher of Michael Lattea's, David Daniel, who taught in the special education and behavior disorder room, testified that Michael was a very aggressive person who liked to fight and talked about fighting all the time. He testified that in his opinion Michael was an aggressive kid who liked confrontations. (Tr. Vol. IV 7-9) Although only eighteen (18) years old, Michael was a large person standing 6 feet tall and weighing 188 lbs. (Tr. Vol. III 158)

On the night of the incident, Eddie Lattea, Michael Lattea, and Donald Shaffer were living up to their reputation in the community. They were drunk, they were in a group, and they were looking for a fight. Eddie and Michael had been drinking since early in the evening. Donald Shaffer joined them and they continued to drink. According to Eddie's testimony at trial, he had consumed the same amount of alcohol as Michael that night. He testified they both had consumed around nine (9) beers each. (Tr. Vol. II 57) That would explain why Michael's blood alcohol level was .15 when tested by the Medical Examiners Office, some seven to eight times the legal limit of .02 in West Virginia for someone under 21. (Tr. Vol. III 159)

This confrontation began because Wade Davis yelled to his friend Matt Hensley as Matt made his way to the after hours window at the Sissonville Go- Mart, "tell them to turn the fucking pumps on, please." (Tr. Vol. IV 38) Michael Lattea, as indicated, was intoxicated and, responded to Wade, "You have to pay for it first you dumb mother fucker." (Tr. Vol. IV 38) Wade tried to end the exchange by explaining to Michael, that he was talking to Matt, not to

Michael. Michael refused to let it go and responded with more profanity toward Wade. Michael began walking toward Wade who was standing in between the gas pumps and his truck. (Tr. Vol. IV 39)

Wade was concerned he would become trapped against his truck or tangled in the gas lines and stepped beyond the gas pump as Michael came towards him. Almost at the exact time that Michael and Wade were meeting in the parking lot, Eddie Lattea joined in alongside Michael. Eddie too had been drinking excessively that night. Deputy Jeff Walker, the officer who secured the scene that night, testified that Eddie was highly intoxicated. (Tr. Vol. II 13) When Eddie joined in, Wade immediately noticed that Donald Shaffer was right on Eddie's heels and Wade found himself in a very dangerous situation. Wade knew he had to protect himself from these three men and his only hope was that pulling his pocket knife would cause this confrontation to end. (Tr. Vol. IV 41)

Unfortunately, it did not work. When he pulled his knife he said, "I am not going to fight the three of you here tonight." (Tr. Vol. IV 43) To Wade's amazement, pulling his pocket knife did nothing to help in warding off their attack. Michael immediately took a swing at him and struck Wade in the head, as the other two men continued to converge on Wade. (Tr. Vol IV 43) Donald Shaffer testified at trial that all three men were converging on Wade at the same time. (Tr. Vol. II 183)

Because of his training as a police officer, Wade Davis knew that in order to survive he had to divide the three men. In an attempt to divide them, Wade chased Eddie across the parking lot, and this probably would have worked had Wade not fallen. Wade made it outside of the group of men but once he fell, Michael attacked him a second time. Michael jumped on Wade's

back and began beating him, all the while knowing Wade had a knife. During the second struggle, Michael suffered a fatal injury, unknown to anyone at that time. (Tr. Vol. IV 45-48)

Greg Johnson, a former Chicago police officer and an expert in police procedures, including use of force, self defense, and street survival, testified on behalf of Wade Davis at trial. Mr. Johnson reviewed all the evidence in the case, and his testimony supported Davis' testimony that he acted in self-defense. Mr. Johnson testified that, after reviewing the case, Wade handled the multiple assailants situation as a trained officer is taught to do, he did what was necessary to defend himself against multiple assailants and in the process he divided them. When asked if Wade was using necessary force concerning the incident that took place between Michael Lattea and Wade, Mr. Johnson's answer was yes. Mr. Johnson stated, "You use necessary force so that you can get on your feet and defend yourself." (Tr. Vol. IV 87-88)

The testimony at trial of witnesses at the scene was conflicting. The State's case focused mainly on the testimony of eyewitnesses Donna Brown, Tim Edwards, Paul Grasso, Eddie Lattea and Donald Shaffer. When comparing their statements and testimony, even they were not consistent on the events and how they occurred. However, as noted at trial, Donna Brown, Tim Edwards, and Paul Grasso were all tired, on their way home to Michigan from vacation, and made their observations from a vehicle that was packed so full that Ms. Brown, who was facing the back of the vehicle had to sit with her legs crossed, and they were eating when this incident occurred. Their vehicle was also facing in the opposite direction from where the confrontation occurred. (Tr. Vol. II 16) At trial, these three witnesses all commented about the point when Wade chased Eddie across the parking lot, and in their lay opinion they regarded Wade as the aggressor in the situation, as they did not see Michael do anything that would have required

Wade to defend himself. (Tr. Vol. II 21, 129, 210) As indicated, their interpretation of the events was contradicted by police expert Greg Johnson. (Tr. Vol. IV 88)

It is also important to note that these witnesses did not stay and give a statement to police on the night of the incident. Instead, they left, discussed the incident between themselves as they returned to Michigan, and decided that one of them would call the police. The next day they read about the incident on the internet, and after reading a version of the entire incident in print called the sheriff's department to give a statement. (Tr. Vol. II 27) Even more troubling was the fact that at trial a key point to the prosecution's case was added to Paul Grasso's version of the facts that was not present in his initial statement to police. On cross examination by defense counsel, Mr. Grasso admitted that in his initial statement to police, he did not describe a break in the fight during which time Wade Davis returned to his truck. At trial, he testified that Wade returned to his truck and then ten seconds later he then ran across the lot chasing Eddie with a knife. (Tr. Vol. II 218)

There were two eyewitnesses that were named in the police report that were not even contacted by the State. (Tr. Vol. III 206) Steve Kersey and his girlfriend Shannon Keeney had stopped at Go-Mart to get a few things. They were at the front of the store and did not have the obstructions that the eyewitnesses from Michigan had. Steve was called to testify by the defense and he was able to corroborate several points in Wade's statement and testimony at trial.

Steve Kersey was able to verify that there was in fact a physical confrontation between Wade and Michael before the chase across the parking lot, a point that the witnesses from Michigan deny happened. Kersey placed Eddie Lattea and Donald Shaffer at the physical confrontation between Wade and Michael Lattea, acknowledging that he heard Wade say I am

not going to let you all kill me here tonight. Kersey also testified that in his opinion Michael knew that Wade had a knife and he continued in the confrontation anyway. (Tr. Vol III 205-209)

At the end of the confrontation, Wade and his friends were finally able to make it back to his truck. They attempted to wait for the police to arrive at the far end of the parking lot. They were unable to because instead of aiding Michael, Eddie Lattea and Donald Shaffer were throwing beer bottles, squeegees and full 2 liter bottles at Wade's truck and it became apparent that they were not going to stop. Fearing that things would escalate again, Wade drove to Todd Robinson's place of business, and called for a shift supervisor from the Sheriff's Department.

During that phone call, Wade informed the shift supervisor of the incident and of his whereabouts. Several deputies went to Wade's location and statements were taken from Wade, Todd and Matt. Wade was not arrested that night. He was contacted the next day by the Sheriff's Department and told that he had warrants for his arrest and he needed to be served. He arranged to turn himself in that same day on warrants for First Degree Murder, Attempted Murder and Malicious Wounding. (Tr. Vol. IV 55-57)

ASSIGNMENT OF ERROR

- I. The Trial Court's Failure To Instruct The Jury That Intent To Kill Is An Essential Element Of Second Degree Murder Is Plain Error As It Greatly Prejudiced Davis Because He Claimed The Killing Was Unintentional And The Erroneous Instruction Likely Resulted In His Conviction For That Offense.

DISCUSSION OF LAW

I. The Trial Court's Failure To Instruct The Jury That Intent To Kill Is An Essential Element Of Second Degree Murder Is Plain Error As It Greatly Prejudiced Davis Because He Claimed The Killing Was Unintentional And The Erroneous Instruction Likely Resulted In His Conviction For That Offense.

The second degree murder instruction given by the trial court constitutes plain error as it failed to require a finding of intent to kill. As a result Wade Davis was denied his fundamental right to a fair trial. According to this Court, second degree murder is an intentional crime. *State v. Guthrie*, 194 W.Va. 657, 676, 461 S.E2d 163, 182 (1995). The second degree murder instruction given by the trial court did not contain intent to kill as an element. (Tr. Vol. IV 140) Although defense counsel did not object to the instruction prior to it being read to the jury, the ultimate responsibility of ensuring that a jury is clearly and properly instructed as to the law rests with the trial court. *State v. Lambert*, 173 W.Va. 60, 63, 312 S.E.2d 31, 34 (1984); *State v. Dozier*, 163 W.Va. 192, 196, 255 S.E.2d 552, 554 (1979); *State v. Riley*, 151 W.Va. 364, 394, 151 S.E.2d 308, 326 (1966), overruled on other grounds by *Proudfoot v. Dan's Marine Service*, 210 W.Va. 498, 558 S.E.2d 298 (2001). The trial court failed to meet this responsibility.

In fact, the jury on three separate occasions asked questions concerning the degrees of murder and on each occasion the trial court could have corrected the error but instead continued to read the same faulty instruction to the jury. See notes from the jury, App. A1-3.

The third question by the jury focused directly on the error in the instruction. It stated:

"Can you please verify the following: Is second degree with malice and unlawful without intent and voluntary manslaughter without malice and with intent in the heat of passion. Please verify the with and without intent. Thanks Hazel Mead."
(Emphasis in original)

(Tr. Vol. V 23) (App. A-3)

In response to the jury's question, the trial court once again read the faulty second degree murder instruction and the instruction on voluntary manslaughter to the jury. (Tr. Vol. V 25) Within minutes after the third question was answered, Wade Davis was convicted of second degree murder. Because Wade testified the killing was unintentional, the trial court's failure to require an intent to kill for second degree murder was very prejudicial, resulting in his conviction for that offense.

Failure to instruct a jury on all of the essential elements of the offense charged has been recognized as plain error by this Court. "The trial court must instruct the jury on all essential elements of the offenses charged, and failure of the trial court to instruct the jury on the essential elements deprives the accused of his fundamental right to a fair trial, and constitutes reversible error." Syl, State v. Miller, 184 W.Va. 367, 400 S.E.2d 611 (1990). Accord Syl. Pt. 6, State Wyatt, 198 W.Va. 530, 482 S.E.2d 147 (1996). In Miller, the state did not submit instructions, the defendant did not offer instructions that included all the essential elements of the offenses charged and the court failed to supplement the instructions. This Court held that failing to instruct on all essential elements required reversal because the jury was not actually informed of the elements that the state had to prove beyond a reasonable doubt. Miller, 184 W.Va. at 369, 400 S.E.2d. at 613. Significantly, the Miller Court stated that the failure to instruct the jury on the critical element of intent is reversible error:

For example, recognizing that intent cannot be presumed when it is an element of the crime charged, we held in syllabus point 2 of State v. Barnett, 168 W.Va. 361, 284 S.E.2d 622 (1981): 'In a criminal trial for violation of Code 60A-4-401(a), the jury must be instructed about each element of the crime including intent.' We also noted in State v. Barnett that 'total failure to instruct on a critical element is reversible.' 168 W.Va. at 364 n.2, 284 S.E.2d at 623 n.2.

Id. at 368 n.1, 400 S.E.2d at 612 n.1. Allowing anything less would relieve the state of the burden of proving every essential element beyond a reasonable doubt.

Applying the holding of *Miller* to the case at bar, it is clear the trial court committed plain error when instructing the jury on the offense of second degree murder. The jury instruction the trial court gave for second degree murder was requested by the State and stated the following:

Murder in the second degree is committed when any person kills another person, unlawfully, and maliciously, but without deliberation and premeditation.

Before Wade C. Davis can be found guilty of the offense of murder in the second degree as contained in Charge One of the indictment in this case, the State must overcome his presumption of innocence and prove to your satisfaction, beyond a reasonable doubt, that:

Wade C. Davis, in Kanawha County, West Virginia, on or about the 17th day of March, 2003, did unlawfully and maliciously, but without deliberation or premeditation, kill Michael Allen Lattea.

(Tr. Vol. IV 140). The instruction is missing the essential element of intent to kill.

Because defense counsel failed to object to this erroneous instruction, this error must be reviewed under the plain error standard. *See* Rules 30 and 52, W.Va. Rules of Criminal Procedure. This Court has developed a four (4) factor test to determine if an error will trigger the application of the plain error doctrine: There must be an error; the error must be "plain" either under existing law or under a new legal principle; the error must affect substantial rights or substantially impair the truth-finding function of the trial; and the error must affect the fairness, integrity or public reputation of the judicial proceedings. *State v. England*, 180 W.Va. 342, 347, 376 S.E.2d 548, 553 (1988); *State v. Myers*, 204 W.Va. 449, 513 S.E.2d 676 (1998); *Syl. Pt. 7, State v. Miller*, 194 W.Va. 3, 459 S.E.2d 114 (1995); *Syl. Pt. 2, State ex. Rel. Morgan v. Trent*, 195 W.Va. 257, 465 S.E.2d 257 (1995).

In the case at bar there was clearly an error. The second degree murder instruction given to the jury failed to include intent to kill as an essential element. The error was plain. There is no question that under West Virginia law second degree murder is an intentional crime. In Guthrie, in defining and clarifying the differing degrees of murder in West Virginia, this Court stated, "Any other intentional killing by a spontaneous and non-reflective nature is second degree murder." Id. at 182, 461 S.E.2d at 676. See also the proposed model jury instructions for second degree murder created by a prosecution subcommittee appearing on this Court's web site under Legal Reference, Model Jury Instructions. That instruction states: "Murder of the second degree is the unlawful, intentional killing of another person with malice but without deliberation or premeditation."

The error did affect a substantial right. Wade was denied his fundamental right to a fair trial due to the faulty instruction which substantially impaired the truth-finding function of the trial. Every criminal defendant has a fundamental right to a fair trial. State v. Miller 184 W.Va. at 367, 400 S.E.2d at 611; State v. Barker, 176 W.Va. 553, 558, 346 S.E.2d 349, 349 (1986). Part of the right to a fair trial is to have the jury fully and properly instructed as to the applicable law. "Without [adequate] instructions as to the law, the jury becomes mired in a factual morass, unable to draw the appropriate legal conclusion based on facts." Guthrie, 194 W.Va. at 672, 461 S.E.2d at 178 (quoting Miller, 194 W.Va. at 16 n.20, 459 S.E.2d at 127 n.20). It would be impossible for a jury to reach a true verdict without first being instructed with the correct law. In State v. Romine, 166 W.Va. 135, 136, 272 S.E.2d 680, 682 (1980), this Court stated that "it clearly follows that if the court's instructions are erroneous as to the law the jury's ultimate finding will likely be erroneous." This case is a perfect illustration of that principle.

From his initial statement to police until the end of trial, Wade Davis maintained he did not intend to kill Michael Lattea. Wade testified, "You know, it—it was not an intentional stab; I was just swinging the knife, trying to get him away from me." (Tr. Vol. IV 51) Once again when he was asked if he intended to kill Michael, Wade's response was "I was not intending to kill him, I was just trying to keep him away before Eddie or Donald got there to get involved in the fight also." (Tr. Vol. IV 59) Had the jury been properly instructed, it appears they would have reached a verdict of guilty of involuntary manslaughter, an unintentional killing.

The jury's third question focused upon the essence of Wade Davis' testimony that the killing was unintentional. It is clear from the third note to the trial court that they were under the misconception that second degree murder does not require intent to kill. They asked,

Can you please verify the following: Is second degree with malice and unlawful without intent and voluntary manslaughter without malice and with intent in the heat of passion. Please verify the with and without intent. Thanks Hazel Mead. (Emphasis in original)

(Tr. Vol. V 23) (App. A-3). And only minutes after the trial court answered their question by reading the faulty second degree murder instruction and the voluntary murder instruction to them the jury found Wade Davis guilty of the offense they believed did not require intent to kill. If you follow the jury's communications to the court through to the verdict it is clear the jury believed Wade when he testified that he did not intend to kill Michael Lattea.

This misunderstanding of the law by the jury relieved the state of their burden of proving an intentional killing occurred beyond a reasonable doubt. As stated above, it is obvious from the jury's note that they were under the mistaken impression that second degree murder is an unintentional crime. This Court held that "[i]t is reversible error to give an instruction which is misleading and misstates the law applicable to the facts." Syl. Pt. 5, *State v. Wyatt*,

198 W.Va. 530, 482 S.E.2d 147 (1996) (quoting Syl. Pt. 4, State v. Travis, 139 W.Va. 363, 81 S.E.2d 678 (1954)). In the third note the jury specifically questioned the court on intent to kill. This communication from the jury clearly pointed out the mistake in the second degree murder instruction and gave the court a perfect opportunity to correct the mistake prior to a verdict. The trial court not only failed to correct the mistake, it responded by re-reading the faulty instruction to them once again. The court stated the following to the attorney's involved, "[s]o I think they want me to say , 'Yes, you've got this information right', and rather than do that , I think I ought to just read the instructions.....the second and voluntary." (Tr. Vol. V 24-25) Defense counsel requested that the court read through to involuntary because the involuntary instruction had a good discussion of intent, the jury was clearly focusing on intent, and the court refused. (Tr. Vol. V 24)

The only two instructions that were read to the jury were second degree murder and voluntary manslaughter. It is evident the jury was misled by the instruction and believed that second degree murder did not require intent to kill and the court failed to correct them. Ultimately Wade Davis was convicted of second degree murder based on the faulty instruction. The trial court had the perfect opportunity to correct the faulty instruction but failed to do so and thereby denied the defendant his fundamental right to a fair trial as it relieved the state of the burden of proving every essential element beyond a reasonable doubt.

As demonstrated above, the instructional error in the case at bar was not harmless error as the jury's truth-finding process was substantially impaired. Cf. State v. England, 180 W.Va. 342, 344, 376 S.E.2d 548, 550 (1988) (The trial court's instruction improperly defined aggravated robbery, but this Court ruled that the error did not affect the jury's truth-finding

function since there was substantial evidence of a robbery and the defendant admitted that a robbery occurred.) Leaving out the essential element of intent to kill in the second degree murder instruction was very prejudicial to Wade Davis' case.

The final question that must be answered in the plain error analysis is did the error affect the fairness, integrity, or public reputation of the judicial proceedings? The answer in the case at bar is yes, because it is impossible to say that the result of Wade's trial would have been the same beyond a reasonable doubt had the element of intent to kill been included in the instruction. This Court has stated, "[i]n a criminal trial, where it is clear that an erroneous instruction was given and the Court cannot confidently declare beyond a reasonable doubt that such instruction in no way contributed to the conviction or affected the outcome of the trial, the conviction must be reversed and a new trial granted." Syl. Pt. 2, *State v. Romine*, 166 W.Va. 135, 272 S.E.2d 680 (1980). Moreover, this Court found plain error in a similar situation in *Wyatt* where the jury was not properly instructed on the essential elements of the offenses charged:

It is beyond question that such substantial confusion over the proper elements of the offense or offenses which the jury was considering materially affected the right of appellant to full and fair consideration of her case and prejudices the fairness and integrity of the trial. Accordingly, for reasons stated, we find that the giving of State's Instruction No. 6 constituted plain error.

Wyatt, 198 W.Va. at 539, 482 S.E.2d at 156.

The trial court had several opportunities prior to verdict to correct the faulty instruction and allow the jury to decide this case with correct West Virginia law. Again at the hearing on the defendant's motion for judgment of acquittal or in the alternative motion for a new trial, the trial court had an opportunity to grant the defendant a new trial after defense counsel brought this error to the trial court's attention. Counsel argued that under West Virginia law

second degree murder is an intentional crime and therefore it was plain error for the instruction not to include the intent to kill as an element, citing this Court's decision in Guthrie. (1/28/05 Tr. 4) Surprisingly, first assistant prosecutor Don Morris argued to the trial court that second degree murder is not an intentional crime, and that intent is what separates first degree murder from second degree murder: "Second degree murder does not require the finding of specific intent; first-degree murder does." (1/28/05 Tr. 9) At the close of the hearing, the trial court ruled that the jury was properly instructed and the verdict would stand.

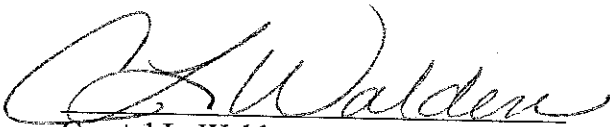
Thus, the erroneous instructions in the case at bar denied Wade Davis his right to a fair trial and due process of law as guaranteed under the State and Federal Constitutions. Sixth and Fourteenth Amendments, U.S. Constitution; Article III, §§ 14, 10, respectively.

RELIEF REQUESTED

For the above reasons, Wade Davis requests that his conviction and sentence be reversed and his case remanded to the circuit court for a new trial.

Respectfully submitted,

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Appendix A

Jury Question #1

12-10-04

0927

We need a copy of the Definitions
for the Different Charges of Murder.

Hazel M Mead
[Signature]

JURY QUESTION #2

12-10-04

1125

In reference to our first Question
Can you please reference the
definition of the Degrees of
Murder.

Hazel Mead
[Signature]

Jury Question #3

12-10-04

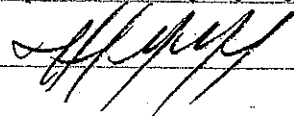
1155

Can you Please verify the following

Is 2nd Degree with malice and unlawful with out intent and

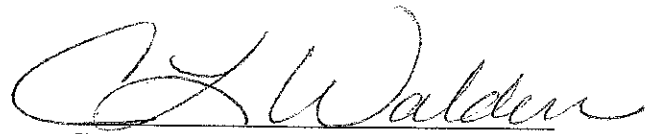
Voluntary Manslaughter with out malice and with intent in the heat of pasion.

please verify the with + with out intent. Thanks

Hazel Mead


CERTIFICATE OF SERVICE

I, Crystal L. Walden, hereby certify that on the 20th day of November, 2006, I sent via United States Postal Service a copy of the foregoing Appellant's Brief to Dawn Warfield, Deputy Attorney General, State Capitol Building 1, Room E-26, 1900 Kanawha Boulevard East, Charleston, West Virginia 25305.

A handwritten signature in cursive script, appearing to read "C. L. Walden", written over a horizontal line.

Crystal L. Walden
Counsel for Petitioner